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4 UNITED STATES DISTRICT COURT  
5 WESTERN DISTRICT OF WASHINGTON  
6 AT SEATTLE

7 BRANDON SUTTON,

8 Petitioner,

9 v.

10 DOUG WADDINGTON,

11 Respondent.

No. C07-1462 MJP

ORDER GRANTING MOTION FOR  
CERTIFICATE OF  
APPEALABILITY

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13 This matter comes before the Court on Petitioner's motion for a certificate of appealability.  
14 (Dkt. No. 24.) Having considered Mr. Sutton's motion, Respondent's opposition (Dkt. No. 25), and  
15 the balance of the record, the Court GRANTS the motion and hereby issues a certificate of  
16 appealability on both issues presented by Petitioner.

17 Under 28 U.S.C. § 2253(c) a petitioner may not appeal the denial of a habeas corpus petition  
18 unless the district court or a circuit court issues a certificate of appealability. The Court may only  
19 issue a certificate of appealability "if the applicant has made a substantial showing of the denial of a  
20 constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this requirement, the petitioner must show  
21 "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have  
22 been resolved in a different manner or that the issues presented were 'adequate to deserve  
23 encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting  
24 Barefoot v. Estelle, 463 U.S. 880, 893 & n.4 (1983)).

25 Mr. Sutton's petition involved two grounds for relief. First, he argued that the information  
26 in his criminal case was constitutionally inadequate because it did not include the elements of  
predicate offenses underlying the offense charged. Although Mr. Sutton does not cite Supreme

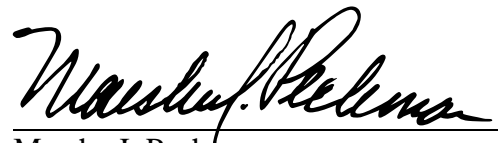
1 Court caselaw directly supporting his position, he relies on a Ninth Circuit decision that does. See  
2 Kreck v. Spalding, 721 F.2d 1229, 1233 (9th Cir. 1983). As this Court stated in its order, Kreck  
3 does not assist Mr. Sutton under the applicable standard of review. (See Dkt. No. 21 at 6.)  
4 However, the Court acknowledges that, given Ninth Circuit precedent, there may be some merit to  
5 Petitioner's argument and finds that it presents a question that "deserve[s] encouragement to  
6 proceed further." Slack, 529 U.S. at 484. The Court therefore grants Petitioner's motion for a  
7 certificate of appealability on this issue.

8 Second, Mr. Sutton argued that the improper remarks made by the prosecutor in his closing  
9 argument violated Mr. Sutton's due process right to a fair trial. This Court found that the contested  
10 remarks did not rise to the level of a due process violation because they were isolated and did not  
11 comprise the theme of the closing argument. (See Dkt. No. 21 at 7-10.) Although the Court  
12 believes Petitioner is unlikely to succeed on appeal, it acknowledges that the merits of this second  
13 claim for relief are at least debatable. Given this conclusion, the Court must grant Petitioner's  
14 motion for a certificate of appealability on this issue. See Miller-El v. Cockrell, 537 U.S. 322, 338  
15 (2003).

16 Petitioner's motion is hereby GRANTED.

17 The Clerk is directed to send copies of this order to all counsel of record.

18 Dated this 1st day of October, 2008.

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20 Marsha J. Pechman  
21 U.S. District Judge  
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